

183412

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-199690

DATE: June 4, 1981

MATTER OF: Sparklet Devices, Inc.

DIGEST:

1. Protester's contention that Air Force 0.75-pound cylinder weight limitation is unduly restrictive of competition because Navy buys protester's 1.25-pound cylinder for similar use is denied. Navy determination that heavier cylinder meets its minimum needs does not preclude Air Force from considering particular use of equipment under operating procedures and conditions different from Navy.
2. Protest that solicitation item description eliminates cylinder safety test requirements and allows use of cylinders not designed, manufactured, marked, or shipped in accordance with Department of Transportation (DOT) regulations on hazardous material is denied. Contracting activity has provided for adequate testing, and DOT regulations provide that material consigned to Department of Defense (DOD) must be packaged either according to DOT regulations or in container (cylinder) of equal or greater strength and efficiency, as required by DOD regulations. Contracting agency has determined that cylinders meet or exceed DOT requirements and need not apply for DOT exemption.

017134

115418

3. GAO will not question agency decision to make award prior to resolution of protest where decision was made in accordance with applicable regulations.

Sparklet Devices, Inc. (Sparklet), protests the contract awarded to American Safety Flight Systems, Inc. (American), for inflation assemblies to be used in survival kits for aircraft ejection systems, under invitation for bids (IFB) No. DLA700-80-B-0828, issued on behalf of the Department of the Air Force by the Defense Logistics Agency (DLA).

Sparklet's protest concerns the carbon dioxide cylinders used in the assemblies which inflate a life raft during pilot descent from an airplane. The protester contends that the IFB schedule item description of the assemblies is restrictive of competition, limits bidders to a single design which does not reflect the Government's minimum needs, and allows use of cylinders which are not designed, manufactured, marked, or shipped in accordance with the Department of Transportation (DOT) requirements on hazardous material--all in violation of Defense Acquisition Regulation (DAR) §§ 1-201(a), 2-101(i) and 2-102.1(a) (1976 ed.) and DOT regulations set forth in 49 C.F.R. parts 100-199 (1979).

Sparklet did not bid, but filed its protests with DLA and our Office prior to bid opening. After review by the Air Force engineering support activity, DLA advised Sparklet that the item description would not be changed and that its protest was denied.

DLA received bids from American and The Bendix Corporation (Bendix). American was the low bidder at \$143.32 per assembly, and DLA awarded the contract to American during the course of the protest. Sparklet also objects to the fact that the award was made prior to the resolution of its protest, notwithstanding Sparklet's offer to supply DLA's urgent requirements during the interim.

The protest is denied.

The IFB item description, as amended, requires inflation assemblies in accordance with Military Specification Nos. MIL-I-87108(USAF), June 1, 1977 (Air Force specification), and MIL-C-7905E, December 14, 1979 (cylinder specification). Paragraph 3.9 of the Air Force specification provides that:

"The weight of the inflation assembly, with the cylinder charged with 0.50 pound (plus or minus 0.01 pound) of carbon dioxide, shall not exceed 1.61 pounds."

Sparklet argues that the amended IFB item description precludes the furnishing of a suitable cylinder which DLA is currently buying from Sparklet for the Department of the Navy. The protester asserts that the cylinders differ only in weight and construction; the cylinder required by the IFB is welded and limited to 0.75 pound in weight, while the Sparklet cylinder is of seamless construction and has a maximum weight of 1.25 pounds. Sparklet insists that the prescribed 1.61-pound assembly weight limitation can only be met by using a 0.75-pound cylinder which requires welded construction. The protester contends that DOT regulations concerning carbon dioxide cylinders do not allow welded construction, except on nonreusable cylinders made to DOT Specification 39, 49 C.F.R. § 178.65 (1979), unless an exemption has been obtained pursuant to 49 C.F.R. part 107 (1979).

Sparklet further contends that the combined Air Force and cylinder specifications eliminate normal cylinder specification requirements for safety demonstrations, including endurance, flattening, macrostructure, fragmentation resistance, vibration and physical properties. Also, the amended item description, which eliminates the fragmentation resistance and product qualification requirements of the cylinder specification, obviated conformance with DOT requirements without DOT's approval.

The protester concludes that it cannot knowingly supply an item which does not meet military specifications or standards and violates DOT regulations

because contractors are liable for violation of DOT regulations. Sparklet argues that the IFB item description prevented it from bidding and that if DOT regulations can be ignored, the IFB should so state in order to permit all bidders to bid on an equal basis without fear of violating Federal regulations. The protester insists that if DLA and the Air Force persist in using the item description in question, the Government should hold the contractor harmless and assume liability.

DLA explains that prior to June 1977, the inflation assembly was purchased on a sole-source basis from Bendix. The Air Force purchased the data from Bendix and developed the Air Force specification for competitive procurement.

DLA takes the position that cylinders manufactured in accordance with the Air Force specification equal or exceed the strength and efficiency of cylinders conforming to DOT regulations and, therefore, qualify for shipment under the following DOT regulation:

"(a) Shipments of hazardous materials offered by or consigned to the Department of Defense (DOD) of the U.S. Government must be packaged, including limitations of weight, in accordance with the regulations in this subchapter or in containers of equal or greater strength and efficiency as required by DOD regulations. Hazardous materials shipped by DOD under this provision may be reshipped by any shipper to any consignee provided the original packaging has not been damaged or altered in any manner." 49 C.F.R. § 173.7(a) (1979).

Contrary to Sparklet's contentions, DLA states that the cylinder specification requires cylinder testing for burst pressure comparable to the DOT specifications. DLA reports that the Air Force purchased more than 50,000 lightweight cylinders

from Bendix between 1963 and 1977 and experienced no shattering or other problems, including during combat use. In eliminating the fragmentation resistance and product qualification requirements of the cylinder specification from the Air Force specification, DLA states that the Air Force determined that the first article testing and quality conformance inspection requirements of both specifications are sufficient to assure the quality of the assemblies, citing DAR § 1-1109(a)(2) (1976 ed.) and B-166570, June 16, 1969.

DLA notes that although the protester alleges that the 0.75-pound cylinder weight can only be met by using welded construction, Sparklet does not argue that it could not meet this requirement by using welded construction or that the requirement can only be met by a single manufacturer. DLA states that Sparklet did compete, albeit unsuccessfully, on a prior similar solicitation. The contracting agency emphasizes the fact that it did receive two responsive bids on the instant IFB.

DLA states that according to the Air Force engineering and design experts, the 0.75-pound cylinder weight limitation is necessary to decrease the overall weight of the survival kit, to help alleviate center-of-gravity problems in the ejection system, and to minimize the probability of injury to aircrew members during descent and entry into water. The agency further explains that because the cylinder is the largest single item on the life raft, an increase in its weight or size adversely affects the weight of the kit and increases its potential to inflict injury. DLA therefore concludes that there are valid reasons for the weight limitation and the fact that Sparklet is unable or unwilling to compete for the IFB requirements does not render the weight limitation unduly restrictive of competition. The agency cites our decisions in Audiometer Corporation of America, B-194557.2, January 4, 1980, 80-1 CPD 14; D&S Word Processing Systems, B-194247, June 25, 1979, 79-1 CPD 451; J. S. Tool Co., Inc., B-193147, March 7, 1979, 79-1 CPD 159; and Constantine N. Polites & Co., B-189214, December 27, 1978, 78-2 CPD 437.

Finally, DLA recognizes that the contracts under which Sparklet is furnishing its cylinder to the Navy permit a maximum weight of 1.25 pounds, and that the Army also uses Sparklet's cylinders. However, the Navy's typical ejection is a low-altitude ejection off the deck of a carrier and the raft is not inflated until it is in the water. Under the Air Force procedures, the raft is inflated at high altitudes during descent; therefore, Air Force concerns regarding the weight of the cylinder differ from those of the Navy because of different operating procedures.

Procuring agencies are required, pursuant to DAR § 1-1201(a) (1976 ed.), to state specifications in terms which will encourage maximum competition and still satisfy the agency's actual minimum needs. We have consistently stated that a procuring activity is to be accorded broad discretion in determining its needs because Government procurement officials, familiar with the particular conditions under which equipment has been and is to be used, are in the best position to know the Government's actual needs and to draft appropriate specifications. D&S Word Processing Systems, supra; J. S. Tool Co., Inc., supra. When a protester challenges a specification as unduly restrictive of competition, the agency must establish prima facie support for its contention that the restrictions imposed are reasonably related to its needs, but the protester retains the burden of showing that the requirements complained of are clearly unreasonable. Oshkosh Truck Corporation, B-198521, July 24, 1980, 80-2 CPD 161; Constantine N. Polites & Co., supra.

Sparklet has failed to meet its burden of proof. Initially, the fact that the protester's cylinder is used by the Navy or any other Federal department or agency is not sufficient to show that the Air Force requirement is unreasonable. We have recognized that agency technical judgments with respect to similar needs can reasonably differ. Security Assistance Forces & Equipment International, B-199757, November 19, 1980, 80-2 CPD 383; Constantine N. Polites & Co., supra. The record shows that the operating procedures and conditions in which the Air Force uses the assemblies are different from those under which the equipment is used by the Navy.

Although the Air Force states that the 1.25-pound cylinder is acceptable for use as a substitute only when the preferred cylinder cannot be obtained because a heavier cylinder is better than no cylinder, we believe that the reasons stated by the Air Force adequately support its contention that the 0.75-pound cylinder weight limitation is reasonably related to the agency's needs. Where, as here, the sole purpose of the equipment is to save lives, we are not prepared to conclude that the specification exceeds the Government's needs for the procurement. Oshkosh Truck Corporation, supra; 52 Comp. Gen. 801, 806 (1973). Neither can we conclude that the cylinder weight restriction prejudices Sparklet to any degree, because all bidders were subject to the same requirement.

Contrary to Sparklet's interpretation of the IFB item description, the cylinder specification retained endurance, flattening, macrostructure, vibration and physical properties testing requirements. Only the provisions regarding product qualification and fragmentation resistance were eliminated from the cylinder specification. However, the Air Force specification for the inflation assembly contains testing requirements which are applicable to the contractor. We have held that the contracting agency's responsibility for determining its actual needs includes the determination of testing requirements requisite to assure that the product offered does in fact meet those needs. B-166570, June 16, 1969. The agency may, for example, choose to ascertain the acceptability of the equipment by requiring first article testing or product qualification. B-166570, June 16, 1969; see Sparklet Devices, Inc., B-182580, April 3, 1975, 75-1 CPD 197.

Bendix states that it produced 50,000 lightweight cylinders over a 17-year period with no report of accident or injury due to cylinder failure, that the endurance, flattening, vibration, and other test requirements were completed and reported for those cylinders and that Bendix obtained DOT approval for shipment of the lightweight design, charged cylinders

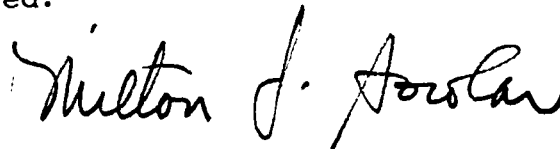
and shipped 39,000 of them under DOT Special Permit No. 3888 which was renewed six times. We have informally ascertained from DOT that the permit, issued under 49 C.F.R. § 173.22(a)(1) (1967), authorized Bendix to ship cylinders in compliance with an earlier version of the instant cylinder specification (MIL-C-7905C). In 1974, when Bendix sought to renew the permit, however, DOT did not extend it on the basis that the agency had been advised by Headquarters, Military Traffic Management Service, Washington, D.C., that all future shipments of cylinders would be made under provisions similar to the above-quoted 49 C.F.R. § 173.7(a) (1979).

Insofar as Sparklet is concerned with DLA and Air Force compliance with DOT regulations, we concur with DLA that the cylinders may be shipped pursuant to 49 C.F.R. § 173.7(a) (1979). For purposes of the DOT regulations, the cylinders constitute shipping containers for the carbon dioxide. In terms of this procurement, the DOT regulation provides that carbon dioxide consigned to the Department of Defense (DOD) must either be packaged (1) according to DOT regulations or (2) in containers (here, cylinders) of equal or greater strength and efficiency, as required by DOD regulations. The DOD regulation referred to is a Tri-Service Regulation, "Policies and Procedures for Hazardous Materials Package Certification," November 2, 1979, identified within DLA as Defense Logistics Agency Regulation (DLAR) 4145.37. The regulation establishes, among other things, certificate of equivalency (COE) procedures pursuant to which an approval is issued by the responsible DOD command that the proposed packaging for shipment of hazardous material or item equals or exceeds the requirements of 49 C.F.R. parts 100-199. DLAR 4145.37 §§ 3(b) and 5(b) (1979).

DLA states that it has determined that the lightweight cylinders in question do equal or exceed the strength and efficiency required by DOT. In so doing, DLA chose to comply with the latter of the alternative requirements of DOT regulation 49 C.F.R. § 173.7(a); therefore, there is no need to apply for an exemption under 49 C.F.R. § 107.103 (1979), contrary to Sparklet's view.

Finally, we find no basis to question DLA's decision to award the contract while the protest was pending. DLA has presented evidence to show that the determination to award based on the urgent need to replenish diminished stock was approved at an appropriate level above that of the contracting officer and our Office was so notified, as required by DAR § 2-407.8(b) (1976 ed.). We have held that where a contracting agency has taken the steps outlined above, the determination to proceed with an award prior to the resolution of the protest is not subject to question by our Office. D&S Universal Mining, Inc., B-199441, November 19, 1980, 80-2 CPD 381; SAI Comsystems Corporation, B-196163, February 6, 1980, 80-1 CPD 100.

The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Aorstar".

Acting Comptroller General
of the United States